IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1344

RICHARD A. SCARBOROUGH, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTIONAL STATEMENT	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
I. The Court Erred in Holding that a Conviction Under 18 U.S.C. App. § 1202(a) For Possession of a Firearm in Commerce or Affecting Commerce by a Convicted Felon Is Sustainable Merely Upon a Showing that the Possessed Firearm Has Previously at Any Time However Remote Travelled in Interstate Commerce	7
II. The Court Erred in Refusing To Suppress the Use at Trial of Firearms Seized from Petitioner's Home, When Those Firearms Were Seized by a Federal Agent Who Was Present Looking For Firearms, Without Probable Cause To Believe that Firearms Were Present, and Who Was in Petitioner's Home Without a Warrant	11
CONCLUSION	14
APPENDIX:	
Opinion of the Court of Appeals	1a

TABLE OF CITATIONS

CASES:

Byars v. *United States*, 273 U.S. 28 (1927) 11, 12, 13

Coolidge v. *New Hampshire*, 403 U.S. 443 (1971) 12

Crain v. *United States*, 162 U.S. 625 (1895) 10

	Page
Harris v. *United States*, 390 U.S. 234 (1968) (per curiam)	12
Lustig v. *United States*, 338 U.S. 74 (1949)	11
Navarro v. *United States*, 400 F.2d 315 (5th Cir. 1968)	11
Turner v. *United States*, 396 U.S. 398 (1970)	10
United States v. *Bass*, 404 U.S. 336 (1971)	6, 7, 8, 9, 10, 11
United States v. *Bell*, 524 F.2d 202 (2nd Cir. 1975)	8, 9
United States v. *Brown*, 472 F.2d 1181 (6th Cir. 1973)	9
United States v. *Bush*, 500 F.2d 19 (6th Cir. 1974)	9
United States v. *Cassity*, 509 F.2d 682 (9th Cir. 1974)	9
United States v. *Day*, 476 F.2d 562 (6th Cir. 1973)	9
United States v. *Goodie*, 524 F.2d 515 (5th Cir. 1975)	9
United States v. *Haley*, 500 F.2d 302 (8th Cir. 1974)	10
United States v. *Kelly*, 519 F.2d 251 (8th Cir. 1975) *cert. denied* — U.S. —, 44 U.S.L.W. 3263 (11/3/75)	9
United States v. *Sanchez*, 509 F.2d 886 (6th Cir. 1975)	12, 13
United States v. *Steeves*, 525 F.2d 33 (8th Cir., 1975)	9
United States v. *Walker*, 489 F.2d 1353 (7th Cir. 1973), *cert. denied* 415 U.S. 982 (1974)	9

STATUTES:

United States Constitution, Amendment Four	2, 12, 13
18 U.S.C. § 3231	2, 5
18 U.S.C. App. § 1202(a)	*passim*
28 U.S.C. § 1254(1)	2

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The petitioner, Richard A. Scarborough, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to reverse its decision affirming the judgment of the United States District Court for the Eastern District of Virginia, Alexandria Division.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is as yet unreported but is appended hereto (See, Appendix, page 1a).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 29, 1976 in *United States* v. *Richard A. Scarborough,* No. 74-1193. The final judgment of conviction in the United States District Court for the Eastern District of Virginia, Alexandria Division, was entered on November 30, 1973 in *United States* v. *Richard A. Scarborough,* Cr. No. 240-73-A. On February 26, 1976, an extension of time in which to file the instant Petition for Writ of Certiorari was granted upon application to Chief Justice Warren E. Burger, Circuit Justice for the Fourth Circuit. Said extension was granted to and including March 19, 1976. This Petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction of the Court of first instance was under 18 U.S.C. §3231.

QUESTIONS PRESENTED

I. Whether the Court erred in holding that a conviction under 18 U.S.C. App. § 1202(a) for possession of a firearm in commerce or affecting commerce by a convicted felon is sustainable merely upon a showing that the possessed firearm has previously at any time however remote travelled in interstate commerce.

II. Whether the Court erred in refusing to suppress the use at trial of firearms seized from petitioner's home, when those firearms were seized by a federal agent who was present looking for firearms, had no probable cause to believe that firearms were present, and was in petitioner's home without a warrant.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Title 18 U.S.C. App. §1202(a) provides in pertinent part:

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .

* * *

and who receives, possesses or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined no more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

On January 20, 1972, Mr. Scarborough entered a plea of guilty to a felony charge in the Circuit Court of Fairfax County, Commonwealth of Virginia. Subsequently, on August 1, 1973, petitioner was arrested, by a county policeman, on a state narcotics charge, who then obtained a search warrant for the sole purpose of seizing any controlled substance that might be found in Scarborough's home.

Armed with this warrant, several Fairfax County policemen proceeded to make a search of Scarborough's home. Accompanying them was William H. Seals, a Special Agent with the United States Treasury Department Bureau of Alcohol, Tobacco and Firearms, who came to search for and thereupon seized four weapons.

Scarborough was subsequently charged in a one count indictment alleging receipt and possession of the four firearms in violation of 18 U.S.C. App. § 1202(a).

On October 5, 1973, petitioner moved to suppress the use at trial of those weapons, which had been seized without proper warrants. The motion was denied in part, and later denied in full on October 12, after further argument.

The testimony of the Treasury agent revealed that he was investigating Scarborough for violations related to firearms and that he believed him to be in possession of firearms in violation of federal law. He accompanied the county policemen in their search because he believed that firearms might be present at Scarborough's home. Nevertheless, the agent candidly admitted that he did not have enough information to obtain his own independent federal search warrant for firearms. He also admitted that he participated in the search of Scarborough's home. In fact, during the preliminary hearing the presiding magistrate made a finding that "Mr. Seals [the Treasury agent] was there as a representative of the United States Government, and Mr. Seals obviously was looking for firearms."

Four weapons were eventually found within the Scarborough residence, which was lived in jointly by the petitioner and his wife. While the agent testified at the suppression hearing that the guns were initially found by a county policeman and then turned over to him, he had previously testified at the preliminary hearing that he had been the one to seize the first two guns, and that he had been the one to find the second two. In any event, it was uncontroverted that the Treasury agent took possession of all four guns at the house, examined and unloaded each, and removed them from the house at the conclusion of the search. He made this

seizure without a warrant because it would have been a "very large inconvenience" to get one.

On October 23, 1973, a jury trial was held before the Honorable Albert V. Bryan, Jr., District Court Judge for the Eastern District of Virginia, Alexandria Division.[1]

At trial, it was adduced that Scarborough had entered a guilty plea to a felony charge on January 20, 1972 in the Circuit Court of Fairfax County, Commonwealth of Virginia. Numerous witnesses were called in an attempt to establish that the seized weapons had travelled in and affected interstate commerce. However, with regard to all four weapons, the proof uniformly established only movement or affect on interstate commerce *prior* to January 20, 1972, the date upon which the petitioner became a convicted felon. The Universal Firearm was shown to have been shipped on May 21, 1969; the Colt Cobra was shown to have been shipped in August, 1969; the M-1 rifle was shipped in 1966; and the fourth weapon was shown only to have been manufactured in France at an uncertain time prior to World War II.

Because no evidence was introduced showing that these guns had moved in or affected interstate commerce at any time after his conviction, counsel for petitioner moved for a judgment of acquittal at the close of the government's case. The Court then dismissed that part of the indictment alleging "receipt" stating that it didn't think there was any evidence of receipt of any weapon after the felony conviction. The case concerning possession however, continued. The Court later denied a proffered instruction concerning the required nexus between possession and commerce containing in pertinent part:

---

[1] Jurisdiction was conferred by 18 U.S.C. § 3231, *supra*.

> In order for the defendant to be found guilty of the crime with which he is charged, it is incumbent upon the Government to demonstrate a nexus between the "possession" of the firearms and interstate commerce. For example, a person "possesses" in commerce or affecting commerce if at the time of the offense the firearms were moving interstate or on an interstate facility, or if the "possession" affected commerce. It is not enough that the Government merely show that the firearms at sometime had travelled in interstate commerce . . . .

This instruction was based on this Court's opinion in *United States* v. *Bass,* 404 U.S. 336, 350 (1971).

Thereafter, on October 24, 1973, Scarborough was found guilty of possession in commerce or affecting commerce four firearms, having previously been convicted of a felony. On November 30, 1973, petitioner was sentenced to confinement for a period of one year, said sentence to run consecutively with any current sentence.

On January 29, 1976, the United States Court of Appeals for the Fourth Circuit affirmed the conviction holding in effect that mere possession of firearms that have previously travelled in interstate commerce provides a sufficient nexus between that possession and commerce so as to support a conviction under 18 U.S.C. App. § 1202(a) regardless of whether the firearms found their way into the possession of an individual before having been convicted of a felony.

REASONS FOR GRANTING THE WRIT

The fundamental question in this case is whether the required nexus between possession of a firearm by a convicted felon and the effect of such possession upon

interstate commerce is satisfied merely upon a showing that the possessed firearm has previously travelled in interstate commerce. In deciding this question in the affirmative, the Fourth Circuit stands squarely at odds with several other circuits. Moreover, in refusing to draw a distinction between the requisite nexi to commerce that must be shown to establish possession as opposed to receipt, the Fourth Circuit stands in conflict with a plurality of the members of this Honorable Court in *United States* v. *Bass,* 404 U.S. 336, 350 (1971). Action by this Court is necessary to achieve uniformity in the application of 18 U.S.C. App. § 1202(a).

I. THE COURT ERRED IN HOLDING THAT A CONVICTION UNDER 18 U.S.C. APP. § 1202(a) FOR POSSESSION OF A FIREARM IN COMMERCE OR AFFECTING COMMERCE BY A CONVICTED FELON IS SUSTAINABLE MERELY UPON A SHOWING THAT THE POSSESSED FIREARM HAS PREVIOUSLY AT ANY TIME HOWEVER REMOTE TRAVELLED IN INTERSTATE COMMERCE.

In *Bass, supra,* the Court held that under 18 U.S.C. App. §1202(a) a nexus to interstate commerce must be shown with respect to a convicted felon receiving, transporting or possessing a firearm, 404 U.S. at 347. Since the government failed to introduce any evidence at trial demonstrating an affect upon commerce, Bass' conviction was reversed.

In the instant matter, the firearms in question had been received by petitioner prior to his state felony conviction in 1972. For this reason, the District Court dismissed the receipt charges under § 1202(a) recognizing that federal jurisdiction is contingent upon receipt in or affecting commerce *subsequent* to a felony con-

viction. Petitioner possessed the firearms prior to his state felony conviction; he did not move the firearms in interstate commerce nor in any way exercise his possession so as to affect interstate commerce.

The Court clearly stated in *Bass* that "we do not interpret § 1202(a) to reach the 'mere possession' of firearms." 404 U.S. at 350.

In Part III of the *Bass* opinion, Mr. Justice Marshall, joined by Justices White, Stewart and Douglas, discussed the necessary interstate nexus that must be shown with respect to the "possession" and "receipt" offenses:

> The Government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person 'possesses . . . in commerce or affecting commerce' if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. *Significantly broader in reach, however, is the offense of 'receiv[ing]* . . . in commrce or affecting commerce,' for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce.
>
> 404 U.S. at 350 (emphasis added)

Thus, to prove the offense of "receiving," it is enough that the government prove the firearm has previously travelled in interstate commerce; to prove the offense of possessing," however, an affect upon commerce must be shown to be contemporaneous with the possession. This construction was adopted by the Second Circuit in *United States* v. *Bell*, 524 F.2d 202 (2nd Cir. 1975), in which the Court recognized:

> The message seems clear—a contemporaneous interstate nexus is necessary for a possession conviction but interstate transportation at some *prior* point suffices where the offense charged is receipt of a weapon.
>
> *Id.* at 205.

This view has been expressly followed by the Second, Eighth and Ninth Circuits. *See, e.g., United States* v. *Bell, supra; United States* v. *Steeves*, 525 F.2d 33, 38-39 (8th Cir., 1975); *United States* v. *Kelly*, 519 F.2d 251, 252 (8th Cir., 1975) *cert. denied* —— U.S. ——, 44 U.S.LW. 3263 (11/3/75); *United States* v. *Cassity*, 509 F.2d 682 (9th Cir., 1974). Additional support may be found in the Fifth and Seventh Circuits. *See, e.g., United States* v. *Goodie*, 524 F.2d 515, 516-517 (5th Cir., 1975); *United States* v. *Walker*, 489 F.2d 1353, 1357-1358 (7th Cir., 1973) (Stevens, J.) *cert. denied* 415 U.S. 982 (1974). In *Walker*, speaking of the distinction drawn in *Bass*, Judge, now Justice, Stevens stated:

> Similarly, the Court expressly stated that the receipt offense is 'significantly broader in reach' than the possession offense *Id.* at 350, 92 S.Ct. 515. Apparently possession is not proscribed unless the gun is 'moving interstate or on an interstate facility, or if the possession affects commerce.' *Id.* at 350, 92 S.Ct. at 524.
>
> 489 F.2d at 1357.

The Fourth Circuit stands alone in refusing to recognize the distinction drawn in *Bass*. Cases cited by the Fourth Circuit in support of its position, *e.g.*, *United States* v. *Bush*, 500 F.2d 19 (6th Cir., 1974); *United States* v. *Day*, 476 F.2d 562 (6th Cir., 1973); *United States* v. *Brown*, 472 F.2d 1181 (6th Cir., 1973);

United States v. *Haley,* 500 F.2d 302 (8th Cir., 1974) (see Appendix, Page 5a at n. 8) all involve conviction for either "receipt" or "receipt and possession." There is no question that Courts of Appeal have held that proof of the firearm's prior travel in commerce suffices where the broader offense of "receipt" is charged. This is also true when "receipt and possession" is charged because where a verdict of guilty results upon charges specified in the conjunctive, the verdict is valid if the proof supports either of the charges. *Crain* v. *United States,* 162 U.S. 625 (1895); *Turner* v. *United States,* 396 U.S. 398 (1970) and cases cited therein. In *Turner,* the Court declared:

> The general rule is that when a jury returns a verdict of guilty on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.
>
> *Id.* at 420.

In the instant case, petitioner was convicted only for "possession" and since the government failed to proffer any evidence establishing an effect upon commerce contemporaneous with and as a result of such possession, it failed to meet the legal burden outlined in *Bass.* In view of the great number of cases arising under 18 U.S.C. App. § 1202(a) and the conflict among the Circuits, petitioner prays that the question at issue be settled in conformity with the distinction drawn in *Bass.*

II. THE COURT ERRED IN REFUSING TO SUPPRESS THE USE AT TRIAL OF FIREARMS SEIZED FROM PETITIONER'S HOME, WHEN THOSE FIREARMS WERE SEIZED BY A FEDERAL AGENT WHO WAS PRESENT LOOKING FOR FIREARMS, WITHOUT PROBABLE CAUSE TO BELIEVE THAT FIREARMS WERE PRESENT, AND WHO WAS IN PETITIONER'S HOME WITHOUT A WARRANT.

As set forth in the Statement of the Case, *supra,* Agent Seals was conducting a search on his own, with an object separate and apart from that of his companion state policemen. Moreover, Seals admitted having no independent probable cause for his search. The resulting seizure of guns from the petitioner's home was thus unconstitutional.

In *Byars* v. *United States,* 273 U.S. 28 (1927), state police, pursuant to a state warrant authorizing a search for intoxicating beverages and related materials, sought the assistance of a Federal Prohibition Agent who accompanied the state officers. The search uncovered certain strip stamps of the kind used on bonded whiskey bottles, the possession of which was a federal offense. Finding the search to be a federal search, the Court stated:

> The attendant facts here reasonably suggest that the federal prohibition agent was not invited to join the state squad as a private person may have been, but was asked to participate as a federal enforcement officer, upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent.

273 U.S. at 32. *See, Navarro* v. *United States,* 400 F.2d 315 (5th Cir., 1968); *Lustig* v. *United States,* 338 U.S. 74 (1949).

In the present case, the objects sought by each sovereign were distinctly different. The state agents sought narcotics. The federal agent, however, was present for the purpose of discovering firearms. His seizure of those weapons must stand and be examined by itself, and cannot come within the purview of the state warrant. While it is true that police lawfully present may seize evidence of a crime which is in their plain view, Agent Seals was differently situated. He cannot be considered, as the government contends, an invitee of the state officers. He had entered petitioner's home for distinct purposes, purposes not within the warrant which brought the others there. Since he had no probable cause to search for weapons, he cannot be considered "lawfully" on the premises. The plain view exception is thus not available to him. *Harris* v. *United States,* 390 U.S. 23 (1968) (*per curiam*). His examination and seizure and carrying away of the guns was thus invalid under the Fourth Amendment.

Similarly, in *United States* v. *Sanchez,* 509 F.2d 886 (6th Cir., 1975), the Court ruled that seizure of explosives by an agent of the Bureau of Alcohol, Tobacco and Firearms was illegal where he accompanied state police pursuant to a state warrant authorizing a search for narcotics. The Court explained:

> An essential requirement is that the police officer must have a right to be in the position from which he is able to view the property. *Harris* v. *United States,* 390 U.S. 234 . . . (1968) (*per curiam*). Standing alone, the existence of a "plain view" is insufficient to justify application of the plain view exception. *Coolidge,* [v. *New Hampshire,* 403 U.S. 443 (1971)] 403 U.S. at 468. The government contends that its agent was rightfully on the premises because he had accompanied local police at

> their request when they had executed a valid narcotics search warrant. We find this argument unpersuasive. We believe that the warrant authorized only the local officers to enter and search the Sanchez property for narcotics. It could not be used to validate the entrance of a federal officer having both probable cause and the opportunity to obtain a separate warrant to search for different items of property. *Byars* v. *United States,* 273 U.S. 28 (1927) [citation omitted].
>
> On the facts of this case, there were two simultaneous but disinct intrusions, each conducted by separate agencies for the purpose of securing different types of property. Each search had to be authorized independently by a separate warrant unless the warrant requirement was excused by a valid exception.
>
> 509 F.2d at 889.

The same is true of the present case. The federal government cannot be permitted to have Seals enter the petitioner's home under the authority of a state warrant for narcotics, when his true purpose was to find firearms. Although there is conflict in the testimony as to whether or not he discovered the weapons first, it is undisputed that he examined them at the scene, and that he seized them and carried them away, all without a warrant. Nor can the explanation that his presence as an expert was required in case guns were found excuse the improper search and seizure here. The same claim was made in *Sanchez, supra,* 509 F.2d at 888, n. 1. It is respectfully submitted that this warrantless search and seizure was improper and that the decision below, in conflict with Fourth Amendment principles and the decision of the Court of Appeals for the Sixth Circuit, warrants consideration by this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1193

UNITED STATES OF AMERICA, *Appellee,*

–versus–

RICHARD A. SCARBOROUGH, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Disrtict Court.

Argued: November 14, 1975. Decided: Jan. 29, 1976

Before BOREMAN, Senior Circuit Judge, and RUSSELL and FIELD, Circuit Judges.

• • •

RUSSELL, CIRCUIT JUDGE:

Richard A. Scarborough was convicted of possessing firearms after a previous conviction of a felony in violation of 18 U.S.C. App. § 1202(a)(1). Defendant contends on appeal that: (1) the government failed to establish a nexus between his possession of the firearms and interstate commerce; (2) seizure of the weapons was not pursuant to a proper warrant, (3) the Court failed to instruct the jury that "knowing and intentional possession" may not be presumed from the discovery of objects within a person's dwelling; and (4) delay in the preparation of the trial transcript prejudiced the defendant and denied him due process of law. We affirm.

Scarborough was convicted of a felony in State Court in 1972.[1] On the morning of August 1, 1973, he was arrested by State officers while leaving his house and he had on his

[1] He was convicted of possession with intent to distribute narcotics.

person at the time some 287 doses of LSD. A State search warrant, supported by ample probable cause, was obtained.[2] The police requested an AFT agent to accompany them during the search of the defendant's house.[3] The police discovered four firearms in defendant's bedroom.[4] These were turned over to the ATF agent for unloading (three were loaded), after which they were seized. Defendant was charged with "receiving and possessing" the firearms. At the close of the Government's case, the Court granted defendant's motion for a judgment of acquittal on the part of the indictment alleging "receipt," stating "I don't think

[2] The search warrant was issued pursuant to a sworn affidavit of a State investigator setting forth the following facts: That he had received from a confidential informant information that Richard Scarborough was selling illegal drugs from his home; that the informant had himself purchased illegal drugs from Scarborough on numerous occasions during the "last six months;" that on July 16, 1973, the confidential informant and an undercover agent went to Scarborough's home where the undercover agent observed the confidential informant purchase $125 worth of LSD; the undercover agent had a conversation on the night of July 16, 1973, with Scarborough concerning other illegal drugs which Scarborough said he had in his possession; she observed a container which Scarborough said contained part of his "stash;" also the undercover agent observed numerous illegal pills and suspected marijuana referred to by Scarborough as "Columbian;" and finally the affidavit related the arrest of Scarborough on the State distribution warrant, and the finding of the additional LSD and the suspected phencyclidine on Scarborough's person.

[3] The local police had been informed that Scarborough carried a weapon and they wished the ATF agent to accompany them to be present during the arrest, and as an adviser since he had particular qualifications as a firearms expert.

[4] A colt Cobra 2-inch revolver was found in a nightstand or bureau drawer close to the bed in the master bedroom; a French revolver (St. Etienne) was found in the bedroom; a Universal Arms Company Enforcer .30 caliber and a .30 Caliber U. S. M-1 carbine were found under the bed. All of the weapons were loaded except the French revolver.

there is any evidence of receipt of any weapon after he was a convicted felon." The conviction accordingly rests entirely on possession of the firearms.

There is no dispute that each weapon had previously traveled in interstate commerce.[5]

Consistently since the enactment of the gun control legislation incorporated in the Omnibus Crime Control and Safe Streets Act of 1968, this Circuit has sustained convictions under that statute,[6] where the interstate commerce nexus requirement of the possession offense under the statute was supported by proof that the possessed firearm had previously traveled in interstate commerce. We find nothing in *United States* v. *Bass* (1971) 404 U.S. 336, to compel any change in this ruling and we have since that decision continued to employ the same test for the offense of possession under § 1202(a) as before.

In a recent decision, however, the Second Circuit concluded that *Bass* requires that any conviction for possession under 1202(a) must be supported by proof that possession was contemporaneous with interstate commerce movement. *United States* v. *Bell* (2d Cir. 1975) — F.2d — (decided October 6, 1975). It reaches this result by finding that the Court in *Bass* made a distinction between the offenses of *receipt* and *possession* under the statute and that, while contemporaneous interstate commerce move-

[5] The undisputed evidence showed that the .30 inch caliber Enforcer was manufactured in Florida and shipped from Florida to Virginia, that in 1973, a year after Scarborough had been convicted of a felony, there was ordered from the Florida company on two occasions parts for the Enforcer; the Colt Cobra revolver was manufactured in Connecticut and the totally assembled revolver was shipped from Connecticut to North Carolina; the M-1 carbine was shipped from Illinois to Maryland, and the St. Etienne French revolver was manufactured in France during the nineteenth century.

[6] 18 U.S.C. App. § 1202(a).

ment was not mandated for the offense of *receipt* it was so mandated for *possession*. A careful reading of the statute itself, in our judgment does not support this result nor do we perceive in *Bass* any language that compels this construction of the statute. The Court in *Bass* was not, in our opinion, fixing precise criteria for establishing the degree of proof of interstate commerce movement required under the statute for the offenses of *receipt* and *possession*. This is plain from the language of the Court to the effect that "[T]he Government can obviously meet its burden [of proving interstate movement] in a variety of ways" under the statute and observed that it was noting "only some of these."[7] We are of the opinion that the Congressional purpose as expressed in the statute itself was that it was only necessary to establish that the firearm had previously traveled in interstate commerce to make out the offense whether of possession or of receipt and that *Bass* did not hold otherwise.

We find the language of Judge Young in *United States* v. *Snell* (D.Md. 1973) 353 F. Supp. 280, 284, convincing. He said:

> * * * And if Congress did wish to establish a different interstate nexus for possession than for receipt, it could easily have resorted to the explicit language of other statutes by which it made it clear that the offense was to be limited to transactions contemporaneous with interstate transportation. E.g. the offense of receipt of stolen goods, 18 U.S.C. §§ 2314-2317, is limited to receiving goods "moving as, or which are a part of, or which constitute" interstate commerce.
>
> What is not understandable is that possession should be treated any differently from receipt. A construction of Section 1202(a) that would read a different interstate commerce nexus into "possession . . . in commerce or affecting commerce" and "receives . . . in commerce or affecting commerce" would create,

[7] 404 U.S. at 350.

> rather than resolve, ambiguity. A differing approach to the two parallel phrases thus seems inconsistent with the thrust of the *Bass* decision.
>
> This analysis of Part III of the opinion in United States v. Bass indicates that the Supreme Court did not intend its language therein to substitute for the sort of statutory construction of Section 1202(a) which has lead this Court to conclude that the possession offense is not limited to possession while the firearm is in the stream of commerce.

We accordingly see no reason to recede from our former opinion that the offense of possession under the statute compels only proof that the firearm has previously traveled in interstate commerce.[8]

Defendant next argues that it was error not to suppress the weapons seized since there was no federal warrant. However, the record shows that this was a lawful search under a valid State warrant. Therefore, the Court below was correct in admitting the weapons into evidence.[9] The evidence also indicates that there were several people on the premises being searched, thus raising the danger that the weapons might be removed if the ATF agent left to obtain a federal warrant. As we said in *Anglin* v. *Director* (4th

[8] *United States* v. *Smothers* (4th Cir. 1974) — F.2d —; *United States* v. *Davis* (4th Cir. 1974) — F.2d —; *United States* v. *Kline* (4th Cir. 1974) — F.2d —; *United States* v. *Jordan* (4th Cir. 1974) 502 F.2d 1163; *United States* v. *Mullins* (4th Cir. 1973) 476 F.2d 664. This view has been followed by other circuits: *United States* v. *Busch* (6th Cir. 1974) 500 F.2d 19, 21; *United States* v. *Day*, (6th Cir. 1973) 476 F.2d 562, 569; *United States* v. *Brown* (6th Cir. 1973) 472 F.2d 1181, 1182; *United States* v. *Haley* (8th Cir. 1974) 500 F.2d 302, 304; *United States* v. *Lupino* (8th Cir. 1973) 480 F.2d 720, 723-4, *cert. denied* 414 U.S. 924 (1973). *Contra, United States* v. *Cassity* (9th Cir. 1974) 509 F.2d 682, 683.

See, also, *Barrett* v. *United States* (1975) — U.S. —, 18 CrL. 3033, decided January 13, 1976.

[9] *See, United States* v. *Johnson* (4th Cir. 1971) 451 F.2d 1321, 1322, *cert. denied* 405 U.S. 1018 (1972).

Cir. 1971) 439 F.2d 1342, 1347, *cert. denied* 404 U.S. 946 (1971); "[O]nce the privacy of the dwelling has been lawfully invaded, it is senseless to require police to obtain an additional warrant to seize items they have discovered in the process of a lawful search."

We find no merit in defendant's contention that the Court failed properly to instruct the jury on the matter of possession. In fact, the Court instructed the jury that mere knowledge was not sufficient, but that possession depended on the defendant's "control and dominion" over the weapons. Evidence of the defendant's "control and dominion" over the weapons was quite sufficient to support the verdict.[10]

We find defendant's remaining ground without merit. He was not prejudiced by the delay in the transmittal of the transcript of his trial.

The conviction is accordingly affirmed.

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[10] Two of the weapons were under the bed, and the other two were in drawers less than five feet from the bed. Three of the weapons were loaded.